

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAURA FUJISAWA, et al.)	
)	
Plaintiff(s),)	No. C07-5642 BZ
)	
v.)	Related Cases: C07-3431 BZ
)	C08-4118 BZ
COMPASS VISION, INC., et)	C09-2016 BZ
al.,)	
)	
Defendant(s).)	ORDER DENYING DEFENDANTS
)	NATIONAL MEDICAL SERVICES'
)	AND COMPASS VISION'S MOTIONS
)	FOR SUMMARY JUDGMENT

Plaintiff Dr. Laura Fujisawa was a licensed California pharmacist. As a result of substance abuse, she entered a rehabilitation program in an effort to maintain her license. She was eventually terminated from the program, principally because of the results of her tests for the presence of Ethyl Glucuronide (EtG) in her system. She then sued Compass Vision, Inc. (Compass) and National Medical Services, Inc. (National or NMS), for negligently implementing and administering EtG testing in California. They have now moved

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1 for summary judgment.¹

2 **THE PHARMACY RECOVERY PROGRAM²**

3 The Board of Pharmacy ("the Board") under the
 4 jurisdiction of the California Department of Consumer Affairs
 5 operates the Pharmacy Recovery Program (Program) pursuant to
 6 California Business and Professions Code § 4360 et. seq. to
 7 rehabilitate pharmacists who have a history of drug or alcohol
 8 abuse. On July 1, 2003 the Board contracted with Maximus,
 9 Inc. to administer the Program.³ The contract required
 10 Maximus to provide a variety of body fluid tests to Program
 11 participants, but initially did not require Maximus to test
 12 for EtG, a minor metabolite of alcohol. Maximus retained
 13 Compass to administer the testing portion of the Program.⁴

14 **ETG TESTING**

15 On May 13, 2003, in a news release, National announced
 16 that it had: "introduced the availability of testing for Ethyl
 17 Glucuronide (EtG), a unique marker found in urine for

18 ///

19 ///

20 ¹ National's and Compass's motions for summary judgment
 21 are nearly identical and the overlapping arguments will be
 22 addressed as such.

23 ² The Court primarily relies on the Joint Statement of
 24 Undisputed facts and other facts which are not reasonably in
 dispute.

25 ³ On its website, Maximus describes itself as a company
 26 which for nearly 40 years "has partnered with federal, state,
 and local governments to make public healthcare programs run
 effectively."

27 ⁴ On its website, Compass describes itself as "the top
 28 provider of substance abuse testing solutions for healthcare
 monitoring programs nationwide."

1 detection of alcohol consumption."⁵ Dr. Anthony Costantino,
2 National's Vice-President of Operations, stated that "EtG will
3 now be the state of the art technique for detecting alcohol in
4 the urine." Thereafter, Kim McKown, President of Compass,
5 contacted National to learn more about the test. National
6 delivered a PowerPoint presentation to Compass on EtG testing.
7 National set 250 ng/ml as the cutoff limit to indicate a
8 positive test, one that would provide a strong indication that
9 the person was recently drinking an alcoholic beverage and
10 detect relapse. National advised Compass that the cutoff
11 limit was "the administratively determined value at which an
12 action must be taken." National also provided background and
13 technical materials to Compass to convince it that the EtG
14 test was the "state-of-the-art" test for detection of alcohol
15 and that 250 ng/ml was the appropriate cutoff level.

16 Compass recommended, and the Board agreed, to require
17 Maximus to include EtG testing in the urine substance abuse
18 test. Participants in the Program were advised that a EtG
19 level of 250 ng/ml would be considered positive and might be
20 considered a relapse regardless of other factors. Initially,
21 Compass sent urine samples for EtG testing to Northwest
22 Toxicology. Sometime in 2004, Compass began sending urine
23 samples to National for testing. National provided the EtG
24 test results to Compass, which provided them to Maximus, which
25 provided the results to the Board.

26
27 ⁵ On its website, National describes itself as for more
28 than 35 years "setting the standard for excellence in clinical
toxicology and forensic testing."

1 By 2005, doubts about the utility of EtG testing began to
2 appear. On August 15, 2005, Dr. Gregory Skipper, one of the
3 early proponents of EtG testing, issued an advisory memorandum
4 to "Regulatory Board Staff or Members" reminding them of the
5 limitations of EtG testing. Among other things, he advised
6 "whenever possible, to refrain from taking action against an
7 employee or licensee based on EtG testing alone." In
8 September 2006, the U.S. Department of Health and Human
9 Services issue a lengthy "Substance Abuse Treatment Advisory"
10 which reviewed the pros and cons of EtG testing and warned
11 that:

12 Currently the use of an EtG test in determining
13 abstinence lacks sufficient proven specificity for use as
14 primary or solo evidence that an individual prohibited
15 from drinking in a criminal justice or a regulatory
16 compliance context, has truly been drinking. Legal or
17 disciplinary action based solely on a positive EtG, or
other test discussed in this *Advisory*, is inappropriate
and scientifically unsupportable at this time. These
tests should currently be considered as potential
valuable clinical tools but their use in forensic
settings is premature.

18 In response to this Advisory, National, Compass and
19 others co-authored an article, based largely on tests
20 conducted on 13 Compass employees who consumed controlled
21 amounts of alcohol. Significantly, none of the Compass
22 employees tested substances such as soy sauce or mouthwash,
23 which contain EtG. The article's conclusion was to validate
24 EtG testing and to recommend establishing "250 ng/mL as the
25 cutoff levels for testing and the use of 500 ng/mL as a
26 guideline for intentional consumption of alcohol." That
27 article was provided to Maximus. It is not clear whether it
28 was provided to the Board. Defendants and the Board continued

1 to rely on EtG testing until January 1, 2009 when National
2 discontinued it.

3 **DR. FUJISAWA**

4 In May 2003, Dr. Fujisawa was terminated from her
5 employment for reasons related to her addiction to proscribed
6 substances other than alcohol. On April 7, 2004, the Board of
7 Pharmacy filed a formal Accusation against Dr. Fujisawa.
8 Pursuant to a stipulated settlement, Dr. Fujisawa entered the
9 Pharmacist Recovery Program ("Program") in December 2004.

10 On March 21, 2006 the Board placed Dr. Fujisawa on
11 probation for five years, subject to various terms and
12 conditions including successful completion of the Program.
13 Specifically, Dr. Fujisawa had to successfully complete random
14 drug screening and abstain from drug and alcohol use. Dr.
15 Fujisawa eventually underwent 69 Random Body Fluid Tests.

16 On September 26, 2006 Dr. Fujisawa tested positive for
17 EtG with a value of 1800 ng/ml. A pharmacist review
18 committee, consisting of two Board employees and one from
19 Maximus, reviewed Dr. Fujisawa's file and determined that she
20 had relapsed. Dr. Fujisawa subsequently returned six
21 additional positive results between October 11, 2006 and March
22 14, 2007. Dr. Fujisawa was terminated from the Program on
23 March 13, 2007 and her license was suspended as a result of
24 her termination. A hearing on the Board's petition to revoke
25 Dr. Fujisawa's probation was held on July 23-24, 2008 before
26 Administrative Law Judge Karen Brandt. Throughout, Dr.
27 Fujisawa maintained that she never consumed alcohol, and that
28 any positive EtG tests were the result of incidental exposure

1 to products, such as hand sanitizers or soy sauce, which can
2 cause positive EtG tests. The ALJ recommended revoking Dr.
3 Fujisawa's license, but staying the revocation pending a one
4 year suspension and successful completion of five years of
5 probation. The Board did not adopt ALJ Brandt's decision and
6 revoked plaintiff's licence. The Board relied primarily on
7 Dr. Fujisawa's positive EtG tests in determining her
8 suitability to practice pharmacy. Dr. Fujisawa did not seek
9 review of that decision pursuant to California Code of Civil
10 Procedure §§ 1094.5, 1094.6. This suit followed.

11 In her amended complaint, Dr. Fujisawa alleges that
12 Compass and National were negligent in:

13 promoting, advertising, marketing, selling, and/or
14 contracting with the licensing board, and/or designing,
15 implementing, and managing the EtG alcohol testing
16 program, and/or collecting the urine samples and/or
17 performing and/or interpreting the EtG testing and/or
18 utilizing the EtG test to allegedly establish that the
19 plaintiff consumed an alcoholic beverage, when it lacked
20 sufficient proven specificity for use as primary or sole
21 evidence that an individual prohibited from drinking, in
22 a regulatory compliance context, had truly been drinking.

23 First Amended Complaint ("complaint") ¶ 82. She alleges that
24 EtG testing is not a reliable way to determine intentional
25 alcohol consumption. Dr. Fujisawa is one of many plaintiffs
26 around the country that have filed suit alleging that EtG
27 testing erroneously led to adverse employment actions.
28 Currently, there are several similar actions pending in this
district, and others in the District of New Jersey, the
Southern District of California, and in state courts.

Litigation Privilege

National and Compass first move for summary judgment on

1 the grounds that any actions they undertook in relation to Dr.
2 Fujisawa were absolutely privileged under California Civil
3 Code § 47, which provides in part that:

4 A privileged publication or broadcast is one made:

5 (b) in any (1) legislative proceeding, (2) judicial
6 proceeding, (3) in any other official proceeding
7 authorized by law, or (4) in the initiation or course of
any other proceeding authorized by law

8 National contends that its role was solely to provide
9 evidence in the form of EtG testing results to the Board for
10 its use in official proceedings authorized by law. National
11 likens its role to that of a witness providing testimony in an
12 administrative proceeding. National relies on several cases
13 which generally stand for the proposition that statements made
14 in the context of a judicial proceeding are privileged and not
15 actionable. National relies heavily on Silberg v. Anderson,
16 50 Cal. 3d 205 (1990), holding that allegedly false statements
17 made by an attorney in the context of a judicial proceeding
18 regarding the neutrality of a psychologist were privileged.
19 The issue in Silberg was whether there was an "interest of
20 justice" exception to § 47, not whether the statements might
21 not be a privileged communication. Silberg's claim was that
22 "contrary to [Anderson's] representation" the psychologist was
23 not neutral. Id at 210. Silberg's claim was not based on the
24 sort of conduct present here. See also Harris v. King, 60
25 Cal. App. 4th 1185, 1188 (1998) (holding that allegedly false
26 statements in a medical report submitted to the State
27 Compensation Insurance Fund were privileged); People ex rel.
28 Gallegos v. Pacific Lumber Co., 158 Cal. App. 4th 950, 958-59

1 (1998) (holding that statements made to government agencies
2 during a CEQA administrative proceeding were privileged).

3 Plaintiff responds by arguing (1) that the litigation
4 privilege does not protect non-communicative acts and (2) that
5 she is suing National for two categories of negligent conduct
6 which are not privileged because they did not take place in
7 connection with or in preparation for any kind of judicial
8 proceeding. The first consists of non-case specific conduct
9 such as "communications by NMS about EtG testing made to the
10 general public or to the scientific community." Doc. No. 232,
11 p. 13. This conduct took place before any proceedings were
12 instituted against Dr. Fujisawa and relates to the Board's
13 initial decision to adopt EtG testing as a component of its
14 Program, in reliance on representations made by Compass and
15 National. The second category of conduct of which Dr.
16 Fujisawa complains is case-specific, such as using the
17 allegedly faulty EtG test to screen Dr. Fujisawa's urine for
18 alcohol and reporting the test to Compass.

19 I do not find National's § 47 argument persuasive for
20 several reasons. As Judge Cavanaugh noted in Garlick v. Quest
21 Diagnostics, Inc., 2009 WL 5033949, *10 (D.N.J. 2009), in
22 rejecting a similar argument, plaintiff's "claims are not
23 based exclusively" on statements made to the board in judicial
24 or quasi-judicial proceedings. Instead, plaintiff's claims
25 are based on "defendants' actions and statements associated
26 with the establishment and promotion of EtG testing that has
27 lead to false positives." Id. Section 47 may provide
28 protection to National for any communications made in the

1 administrative proceedings, but not for its conduct prior to
2 and leading up to those communications. None of the cases
3 cited by National apply to § 47 in the expansive way that
4 National suggests here.⁶ Put another way, "[t]he principal
5 purpose of [the privilege] is to afford litigants and
6 witnesses the utmost freedom of access to the courts without
7 fear of being harassed subsequently by derivative tort
8 actions." Action Apartment Assoc., Inc. v. City of Santa
9 Monica, 41 Cal.4th 1232, 1241 (2007) (internal citations
10 omitted). Plaintiff is not attempting to hinder defendants'
11 access to the courts; she is attempting to hinder their
12 ability to promote and implement an ineffective test which
13 harmed her.

14 Second, none of the cases cited by National or Compass
15 hold that non-communicative conduct is privileged. See Action
16 Apartment Assoc., Inc. v. City of Santa Monica, 41 Cal.4th
17 1232, 1241 (2007). Their cases hold that communications made
18 during various stages of judicial and quasi-judicial
19 proceedings are privileged; none extended that privilege to
20 underlying, non-communicative conduct. Such a holding would
21 yield results the Legislature could not have intended, given
22 the purpose of §47. For example, it might immunize a party
23 who had defended her actions in an administrative or legal
24 proceeding from a subsequent malpractice action. Section 47

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26 ⁶ Brown v. Lab One, Inc., 2007 WL 6199913 (D.Nev.
27 2007), cited by National, is readily distinguishable in that
28 the plaintiff's suit was based solely on the communications
made by the defendant laboratory. Here, Dr. Fujisawa's claims
are premised on conduct that reaches several years prior to Dr.
Fujisawa's first negative test.

1 is not nearly as broad as National argues.

2 **Collateral Estoppel**

3 National and Compass argue that plaintiff should be
4 estopped from litigating the reliability and validity of EtG
5 testing because such issues were litigated in the proceeding
6 before ALJ Brandt. In the administrative proceeding, the ALJ
7 took evidence on the following two questions:

- 8 1. Should respondent's [Dr. Fujisawa's] probation be
9 terminated because she tested positive on six occasion
10 for Ethyl Glucuronide (EtG), a metabolite of alcohol?
- 11 2. Should respondent's probation be terminated because
12 she failed to successfully complete the Pharmacists
13 Recovery Program ("Program"), a condition of her
14 probation?

15 This argument is unpersuasive for several reasons.
16 First, National and Compass were not parties to that
17 proceeding. It is difficult to conceive how plaintiff would
18 have litigated any negligence against those parties in the
19 administrative proceeding, particularly her claims of
20 negligent marketing, advertising, and promotion of EtG
21 testing. Second, National cites no authority to support its
22 position that the doctrine of collateral estoppel would apply
23 in a situation like this. The only case National discussed
24 was Silberg v. Anderson, 50 Cal.3d 205 (1990), a case decided
25 on Code of Civil Procedure § 47 grounds. That opinion did not
26 discuss collateral estoppel and certainly does not stand for
27 the proposition that National suggests. In Castillo v. City
28 of Los Angeles, 92 Cal. App. 4th 477, 418 (2001) the complaint
was dismissed on collateral estoppel grounds because the
plaintiff sued the same entity (the City of Los Angeles) after
an adverse administrative decision and a subsequent denial of

1 a writ of mandate to overturn the administrative decision.
2 Here, Dr. Fujisawa is not suing the Board, the only other
3 entity represented in the administrative proceeding.

4 The issue in this case is not whether Dr. Fujisawa
5 violated the terms of her probation. The issue in this case
6 is whether National or Compass committed a tort by promoting,
7 advertising, and selling EtG testing as a reliable means of
8 detecting alcohol consumption.

9 **Administrative Exhaustion**

10 National and Compass contend that because plaintiff filed
11 this action a year and a half before the Board issued its
12 final decision that plaintiff failed to exhaust her
13 administrative remedies. National cited no authority, and the
14 Court is aware of none, that supports the proposition that a
15 plaintiff needs to exhaust her administrative remedies against
16 a state entity before being allowed to sue non-parties to the
17 administrative proceeding. Here, plaintiff did not sue the
18 Board, and does not seek review of the underlying decision to
19 revoke her license. Plaintiff seeks damages against two
20 parties that were not parties to, and would not have been
21 proper parties to, her administrative hearing.

22 **Judicial Exhaustion**

23 National and Compass contend that if plaintiff was
24 unsatisfied with the Board's decision to revoke her license,
25 she should have sought review by way of a writ of mandate.
26 Plaintiff did not do so. However, as previously explained,
27 plaintiff does not seek review of the decision to revoke her
28 license in this action. Plaintiff's cause of action

transcends the issue whether plaintiff violated a term of her probation. As a term of probation, plaintiff was prohibited from testing at over 250 ng/ml. Plaintiff does not contest that she tested above those limits. Instead, plaintiff argues that those limits were prescribed as a result of defendants negligence and were not accurate indicators of alcohol use and relapse. Those issues were not necessarily determined in the administrative proceeding.

Duty

National and Compass raise the same arguments made in their 12(b)(6) motions and argue that they have no duty toward plaintiff. The Court is not inclined to repeat its analysis of the issue. See Wilson v. Compass Vision, Inc., 2007 WL 4570613 (N.D.Cal. 2007). This Court as well as several others have found that defendants National and Compass owed plaintiff a duty of care. Cleveland v. Compass Vision, Inc., 2008 WL 576755 (N.D.Cal. 2008); Garlick v. Quest Diagnostics, Inc., 2009 WL 5033949 (D.N.J. 2009); Quisenberry v. Compass Vision, Inc., 618 F.Supp.2d 1223 (S.D.Cal. 2007).

Damages

National's and Compass's contention that plaintiff cannot establish causation of damages is without merit. The Board decided to revoke plaintiff's license because it found that she had failed to abstain from alcohol use, as evidenced by six EtG tests over 250 ng/mL. The board heavily relied on the EtG tests to determine that plaintiff violated the terms of her probation. Id. If plaintiff proves that National or Compass negligently established the 250 ng/ml cutoff level, a

1 jury may well determine that such conduct caused plaintiff
2 damages.

3 National repeatedly argues that Dr. Fujisawa was only
4 disciplined based on an examination of a "complete clinical
5 picture." Reply, p. 3. However, after reviewing the Board's
6 decision (Beach Decl. Ex. W), it is clear that the Board
7 relied on the six positive EtG tests almost exclusively. The
8 Board found that Dr. Fujisawa's "test results established that
9 [she] violated the terms of her probation by failing to
10 completely abstain from alcohol use." Id. at 19. National
11 has not persuaded me that plaintiff cannot prove, as a matter
12 of law, damages resulting from the aggrieved of conduct.

13 **11th Amendment Immunity**

14 National and Compass summarily argue that they are immune
15 under the 11th Amendment as an agent of the state but
16 submitted no authority supporting that position. None of the
17 cases cited involve a broad grant of immunity for any state
18 contractors, let alone independent contractors of state
19 subcontractors. As the Ninth Circuit stated after analyzing
20 relevant Supreme Court and other Circuit precedent, "the law
21 makes clear that state sovereign immunity does not extend to
22 private entities," merely because they act pursuant to a
23 contract with the state. Del Campo v. Kennedy, 517 F.3d 1070,
24 1080 -1081 (9th Cir. 2008).

25 **First Amendment Immunity**

26 Compass advances one argument that National does not -
27 that it is entitled to immunity under the First Amendment for
28 its statements regarding the effectiveness of EtG testing.

1 Compass did not cite any authority to support its position
2 that the First Amendment immunizes it for negligently
3 marketing and administering a faulty testing procedure that
4 had serious repercussions.

5 **Conclusion**

6 For the foregoing reasons **IT IS ORDERED THAT** National's
7 and Compass's motions for summary judgment are **DENIED**.

8 Dated: August 13, 2010

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10 Bernard Zimmerman
United States Magistrate Judge

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